86-469

No. .....

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

FLOWREAN ORANGE,

Petitioner,

v.

COLONEL PHIL K. BOMERSHEIM, *et al.*,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PATRICIA J. BARRY
150 South 13th Street
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Grover City, CA 93433
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FLOWREAN ORANGE

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil File No.

Flowrean Orange,

Plaintiff,

vs.

University of Minnesota; the Regents of the University of Minnesota; the United States Department of the Army; Secretary of the Army; Army Reserve Officer Training Corps; and Master Sargeant Dicky Coons and Colonel Phil A. Bomersheim, individually and in their official capacity as officers of the United States Army and Army Reserve Officer Training Corps and agents acting on behalf of the University of Minnesota,

Defendants.

AMENDED COMPLAINT

JURISDICTION

1. Original jurisdiction of this action is conferred upon this Court by Title 28, United States Code, Sections 1331 and 1343.

2. This action arises under the provisions of Title 42, United States Code, Sections 1983 and 1981 on the basis of sexual harassment, sex discrimination, and race discrimination.

3. Pendant jurisdiction is invoked to redress the deprivation of rights arising under Minn. Stat. § 363.03, Subd. 5(1); § 363.01, Subd. 10, 10a, and 20 for unlawful discrimination on the basis of sex and race; under Minn. Stat. 363.03, Subd. 7 for the intentional reprisal against

plaintiff because she opposed such practices in violation of said statute; and under the common law of the State of Minnesota for the tort of the intentional infliction of emotional distress and the tort of outrage.

4. Venue as described above is proper pursuant to 28 U.S.C. § 1391(b), since this action is brought in the judicial district in which the claim arose.

PARTIES

5. Plaintiff Flowrean Orange is a black female, a citizen of the United States and of the State of Minnesota, residing at 1524 East 22nd Street, Minneapolis, Minnesota 55404.

6. Defendant University of Minnesota and the Board of Regents (hereinafter defendant University) is established pursuant to the Minnesota State Constitutional Territorial Laws, 1851, c. 3, as a separately incorporated entity with perpetual existence. The government of the University of Minnesota is vested in its Board of Regents. The University of Minnesota through its Board of Regents has the capacity to sue and be sued.

7. Defendant United States Department and Secretary of the Army (hereinafter defendant U.S. Army), and Army Reserve Officer Training Corps (hereinafter R.O.T.C.) Fourth Regional Senior Instructor group are agencies of the United States established and existing pursuant to the laws of the United States with their principal offices in Washington, D.C.

8. Defendant Master Sargeant Dicky Coons (hereinafter defendant Coons) was at all times relevant herein

acting within the scope of his duties as an enlisted non-commissioned officer of defendant U.S. Army and defendant R.O.T.C., and acting within the scope of his duties as an agent of defendant University serving as an instructor in the R.O.T.C. program at defendant University, whose last known address is 830 126th Avenue Northeast, Blaine, Minnesota, and whose current whereabouts is unknown.

9. Defendant Colonel Phil A. Bomersheim (hereinafter defendant Bomersheim) was at all times relevant herein acting within the scope of his duties as an enlisted officer of defendant U.S. Army and defendant R.O.T.C., and acting within the scope of his duties as an agent of defendant University serving as commanding officer of the Fourth Regional Senior Instructor Group of the R.O.T.C. program at defendant University, currently residing at 2740 Mississippi Street, New Brighton, Minnesota.

FIRST CAUSE OF ACTION

Plaintiff, for her first cause of action against defendants herein, states and alleges as follows:

10. On or about March 1, 1983, plaintiff Flowrean Orange reenlisted in the United States Army Reserve Officer R.O.T.C. program at the University of Minnesota. Plaintiff was active in Veterans' Affairs and was State Department Finance Officer during 1983-84. Plaintiff had formerly been on active duty with the United States Army between May 4, 1973 and June 29, 1976, when she was honorably discharged.

11. During said prior enlistment period, plaintiff received the National Defense Service Medal and the

Good Conduct Medal as a Batallion Commander Secretary where she was stationed in Nurenburg, Germany.

12. That throughout the term of her reenlistment as a R.O.T.C. student at defendant University beginning on or about April 21, 1983, plaintiff was continually subjected to blatant forms of sexual harassment perpetrated by defendant Coons, including but not limited to verbal sexual harassment, threats of assault, exposure of defendant Coons' genitals, and offensive sexual touching of plaintiff's body.

13. That throughout her tenure as an R.O.T.C. student at defendant University, defendant Coons was plaintiff's instructor and military superior.

14. That plaintiff repeatedly advised defendant Coons to cease his harassment. Defendant Coons ignored her pleas to end the harassment.

15. That defendant Coons threatened plaintiff with loss of her career and academic standing if she reported these incidents of sexual harassment.

16. That on or about January 12, 1984, plaintiff reported such incidents of sexual harassment to the appropriate office of defendant University.

17. That on or about Feburary 5, 1984, defendant Coons was removed from his position as instructor in defendant U.S. Army's R.O.T.C. program at defendant University as a result of such sexual harassment.

18. That such sexual harassment constitutes the tort of the intentional infliction of emotional distress and the tort of outrage to plaintiff by defendant Coons and defendant University.

19. That as a direct result of the above-described sexual harassment, plaintiff has suffered acute emotional distress, mental anguish, embarrassment, humiliation, and other pain and suffering.

20. That as a direct result of the above-described sexual harassment, plaintiff was disenrolled on June 11, 1984 from defendant U.S. Army's R.O.T.C. program at defendant University.

21. That as a direct result of the above-described sexual harassment, plaintiff has suffered damage to her career, monetary loss, and loss of other compensation.

SECOND CAUSE OF ACTION

Plaintiff, for her second cause of action against defendants herein, states and alleges as follows:

22. Plaintiff realleges the allegations contained in paragraphs 1 through 21 of this Complaint.

23. That said sexual harassment and said disenrollment constitutes sex discrimination and is a violation of Minn. Stat. § 363.03, Subd. 5, and § 363.01, Subd. 10, 10a, and 20 prohibiting sex discrimination on the part of an educational institution and agents of an educational institution by defendant University and defendant R.O.T.C.

24. That as a direct result of said sexual discrimination and sexual harassment, plaintiff has suffered acute emotional distress, mental anguish, embarrassment, humiliation, and other pain and suffering.

25. That as a direct result of said sexual discrimination and sexual harassment, plaintiff has suffered damage

to her career, monetary loss, and loss of other compensation.

THIRD CAUSE OF ACTION

Plaintiff, for her third cause of action against defendants herein, states and alleges as follows:

26. Plaintiff realleges the allegations contained in paragraphs 1 through 25 of this Compaint.

27. That throughout the term of her reenlistment as an R.O.T.C. student at defendant University, plaintiff was subjected to derogatory racial remarks by defendant Coons and defendant Bomersheim.

28. That throughout the term of her reenlistment as an R.O.T.C. student at defendant University, plaintiff was subjected to less favorable treatment in the processing of plaintiff's contract and age waiver requests based on her race by defendant Bomersheim.

29. That plaintiff was disenrolled on June 11, 1984 from defendant U.S. Army's R.O.T.C. program at defendant University because of her race.

30. That said racial discrimination constitutes a violation of Minn. Stat. § 363.03, Subd. 5(1) and § 363.01, Subd. 20 prohibiting race discrimination on the part of an educational institution and agents of an educational institution by defendant University and defendant R.O.T.C.

31. That as a direct result of said race discrimination, plaintiff has suffered acute emotional distress, mental anguish, embarrassment, humiliation, and other pain and suffering.

32. That as a direct result of said race discrimination, plaintiff has suffered damage to her career, monetary loss, and loss of other compensation.

FOURTH CAUSE OF ACTION

Plaintiff, for her fourth cause of action against defendants herein, states and alleges as follows:

33. Plaintiff realleges the allegations contained in paragraphs 1 through 32 of this Complaint.

34. That said sexual harassment of plaintiff on the basis of her sex is a deprivation of plaintiff's rights to equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States pursuant to 42 U.S.C. § 1983 by defendant Coons, defendant U.S. Army, defendant R.O.T.C., and defendant University.

35. That said disenrollment of plaintiff on the basis of her race and sex without notice or the opportunity to be heard deprives plaintiff of her protected property interests in her career without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States pursuant to 42 U.S.C. § 1983 by defendant Coons, defendant Bomersheim, defendant U.S. Army, defendant R.O.T.C., and defendant University.

36. That as a direct result of said deprivation of rights, plaintiff has suffered acute emotional distress, mental anguish, embarrassment, humiliation, and other pain and suffering.

37. That as a direct result of said deprivation of rights, plaintiff has suffered damage to her career, monetary loss, and loss of other compensation.

FIFTH CAUSE OF ACTION

Plaintiff, for her fifth cause of action against defendants herein, states and alleges as follows:

38. Plaintiff realleges the allegations contained in paragraphs 1 through 37 of this Complaint.

39. That said racial discrimination of derogatory racial remarks and less preferential treatment based on race deprived plaintiff of her property and contract rights to make and enforce contracts as enjoyed by white citizens in violation of 42 U.S.C. § 1981 by defendant Coons, defendant Bomersheim, defendant U.S. Army, defendant R.O.T.C., and defendant University.

40. That said disenrollment of plaintiff on the basis of her race deprives plaintiff of her property and contract rights as enjoyed by white citizens in violation of 42 U.S.C. § 1981 by defendant Coons, defendant Bomersheim, defendant U.S. Army, defendant R.O.T.C., and defendant University.

41. That as a direct result of said racial discrimination, plaintiff has suffered acute emotional distress, mental anguish, embarrassment, humiliation, and other pain and suffering.

42. That as a direct result of said racial discrimination, plaintiff has suffered damage to her career, monetary loss, and loss of other compensation.

SIXTH CAUSE OF ACTION

Plaintiff, for her sixth cause of action against defendants herein, states and alleges as follows:

43. Plaintiff realleges the allegations contained in paragraphs 1 through 42 of this Complaint.

44. That on or about January 12, 1984, defendant Bomersheim became aware of plaintiff's charge of sexual and racial harassment against defendant Coons and defendant Bomersheim.

45. That on or about February 1, 1984, plaintiff requested a leave of absence for medical reasons related to the stress and physical symptoms as a result of the sexual and racial harassment; said leave of absence was granted by defendant Bomersheim.

46. That on or about June 4, 1984, plaintiff delivered, through her attorney, a demand for settlement of the claims herein upon defendant University and said demand included plaintiff's charges against defendant Bomersheim.

47. That on or about June 11, 1984, defendant Bomersheim disenrolled plaintiff from defendant U.S. Army's R.O.T.C. program at defendant University.

48. That plaintiff's disenrollment from said program constitutes a violation of Minn. Stat. § 363.03, Subd. 7 for retaliation against plaintiff for opposing a practice forbidden under said statute by defendant University and defendant R.O.T.C.

49. That as a direct result of such reprisal set forth herein, plaintiff has suffered and will continue to suffer damage to her career, monetary loss, and loss of other compensation.

WHEREFORE, plaintiff demands that judgment be entered against defendants, providing her the following legal and equitable relief:

1. Declaring that the practices, policies, and customs of defendant U.S. Army, defendant R.O.T.C., and defendant University constitute sex and race discrimination in violation of 42 U.S.C. § 1983 by the defendants herein acting to deprive plaintiff of her civil rights.

2. Declaring that the practices, policies, and customs of defendant U.S. Army. defendant R.O.T.C., and defendant University constitute race discrimination in violation of 42 U.S.C. § 1981 by the defendants herein acting to deprive plaintiff of her civil rights.

3. Declaring that the practices, policies, and customs of defendant University and defendant R.O.T.C. constitute sex discrimination in violation of Minn. Stat. § 363.03, Subd. 5; § 363.01, Subd. 10, 10a, and 20; and § 363.03, Subd. 7.

4. Declaring that the practices, policies, and customs of defendant University and defendant R.O.T.C. constitute race discrimination in violation of Minn. Stat. § 363.03, Subd. 5(1); § 363.01, Subd. 20; and § 363.01, Subd. 7.

5. Enjoining defendant U.S. Army, defendant R.O.T.C., and defendant University, their agents and employees, to cease and desist committing illegal discriminatory practices.

6. Ordering defendant U.S. Army, defendant R.O.T.C., defendant Coons, defendant Bomersheim, and defendant

University to pay to plaintiff a sum in excess of $50,000.00 as and for compensatory damages pursuant to 42 U.S.C. § 1983.

7. Ordering defendant U.S. Army, defendant R.O.T.C., defendant Coons, defendant Bomersheim, and defendant University to pay to plaintiff a sum in excess of $50,000.00 as and for compensatory damages pursuant to 42 U.S.C. § 1981.

8. Ordering defendant University and defendant R.O.T.C. to pay to plaintiff a sum in excess of $50,000.00 as and for compensatory damages and damages for pain, suffering, and emotional distress pursuant to Minn. Stat. § 303.071, Subd. 2.

9. Ordering defendant University and defendant R.O.T.C. to pay to plaintiff a sum in excess of $50,000.00 as and for damages for lost earnings pursuant to Minn. Stat. § 363.03 Subd. 7.

10. Ordering defendant University to pay to plaintiff the sum of $200,000.00 as and for compensatory damages attributable to the tortious conduct of defendant Coons.

11. Ordering defendant Coons to pay to plaintiff the sum of $500,000.00 as and for punitive damages.

12. Ordering defendant U.S. Army, defendant R.O.T.C., defendant Coons, defendant Bomersheim, and defendant University to pay to Oakes & Kanatz, attorneys for plaintiff, reasonable attorney's fees, costs, and disbursements pursuant to Minn. Stat. § 363.03, Subd. 7 and 42 U.S.C. § 1988.

13. Granting such other and further relief as the Court shall deem just and proper.

Dated: July 11, 1984.

OAKES & KANATZ
/s/ Veronica Casey
Attorneys for Plaintiff
Park Square Court
Suite 570
Sixth and Sibley Street
St. Paul, Minnesota 55101
227-0804
Atty. Reg. No. 136098

DEMAND FOR JURY TRIAL

The plaintiff, Flowrean Orange, respectfully demands a trial by jury in the above-entitled cause of action.

/s/ Veronica Casey

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil File No. 3-84-957

Flowrean Orange,

Plaintiff,

v.

University of Minnesota; the Regents of the University of Minnesota; the United States Department of the Army; Secretary of the Army; Army Reserve Officer Training Corps; and Master Sergeant Dicky Coons and Colonel Phil A. Bomersheim, individually and in their official capacity as officers of the United States Army and Army Reserve Officer Training Corps and agents acting on behalf of the University of Minnesota,

Defendants.

AFFIDAVIT OF BETTY W. ROBINETT IN SUPPORT OF DEFENDANTS UNIVERSITY OF MINNESOTA AND THE REGENTS OF THE UNIVERSITY OF MINNESOTA'S MOTION TO DISMISS

I, Betty W. Robinett, being duly sworn upon oath depose and say:

1. I am the Assistant Vice President for Academic Affairs at the University of Minnesota. The Office of the Vice President for Academic Affairs has responsibility for all academic employees at the University and for administering the University's contract with the United States Department of the Army under which the Army operates the Army Reserve Officer Training Corps program at the University.

2. Neither Master Sergeant Dickie Coons nor Colonel Phil A. Bomersheim was at any time a salaried employee of the University of Minnesota. The responsibility for the selection and supervision of Sergeant Coons and for determining his role in the Army's Reserve Officer Training Corps program at the University of Minnesota rested at all times with the United States Army and not with the University.

3. Attached hereto as Exhibit A is a true and correct copy of the agreement between the United States Department of the Army and the University of Minnesota dated March 29, 1965. This agreement is still in effect.

4. Attached hereto as Exhibit B is a true and correct copy of the University of Minnesota's official Equal Opportunity Statement.

/s/ Betty W. Robinett

Dated: Sept. 11, 1984

Subscribed and sworn to before me
this 11th day of September, 1984.

/s/ Donna Mae Flaherty
Notary Public SEAL

EXHIBIT A

APPLICATION AND AGREEMENT FOR
ESTABLISHMENT OF ARMY RESERVE
OFFICERS' TRAINING CORPS UNIT

(AR 145-350)

Form Approved Budget Bureau No.

SUBJECT: Application for the Establishment of Army Reserve Officers' Training Corps Unit

THRU : (1) Commanding General, Fifth United States Army, Chicago, Illinois
1660 E. Hyde Park Blvd, Chicago, Ill. 60615

(2) Commanding General, United States Continental Army Command, Fort Monroe, Virginia 23351

TO : The Adjutant General, Department of the Army, Washington, D. C. 20315

APPLICATION

By direction of the governing authorities of (Name of Institution) University of Minnesota I, (Name) L. R. LUNDEN, (Title) Vice President, Business Administration hereby submit application for the establishment of a unit in the senior division of the Army Reserve Officers' Training Corps at this institution under the provisions of section 2102, Title 10, United States Code. Attached hereto is a catalog and a statement of particulars with reference to this institution.

AGREEMENT

1. Contingent upon the acceptance of the above application and conditioned upon the fulfillment of all promises enumerated in paragraph 2 following, the Secretary of the Army agrees as follows:

a. To establish and maintain a senior division unit of the Army Reserve Officers' Training Corps at the institution named in the foregoing application.

b. To assign such military personnel as he may deem necessary for the proper administration and conduct of the Army Reserve Officers' Training Corps program at this institution and to pay the statutory compensation to such personnel from Department of the Army appropriations.

c. To provide for use in the Army Reserve Officers' Training Corps program such available Government property as may be authorized by law and applicable tables of allowances, and to pay at the expense of the Government costs of transportation, drayage, packing, crating, handling and normal maintenance of such property, exclusive of costs including utilities, involved in the storage of such property at the institution.

d. To pay at the expense of the Government, subject to law and regulations, retainer pay at a prescribed rate to enrolled members of the Army Reserve Officers' Training Corps admitted to advanced training.

e. To issue at the expense of the Government uniform clothing for enrolled members of the Army Reserve Officers' Training Corps, except that monetary allowances, at the prescribed rate or rates, may be paid in lieu of uniform clothing.

f. In providing financial assistance to specially selected members under the provisions of section 2107 of Title 10, United States Code, to arrange accounting procedures with the appropriate fiscal officer of the institution.

2. Contingent upon the acceptance of this application by the Secretary of the Army and conditioned upon the fulfillment of the promises enumerated in paragraph 1 above, the governing authorities of this institution agree as follows:

a. To establish a Department of Military Science as an integral academic and administrative department of the institution and to adopt as part of its curriculum [ ] (1) a four-year course of military instruction; [ ] (2) a two-year course of advanced training of military instruction, or [X] (3) both of the above, which the Secretary of the Army will prescribe and conduct.

b. To require each student enrolled in any Army Reserve Officers' Training Corps Course to devote the number of hours to military instruction prescribed by the Secretary of the Army.

c. To make available to the Department of Military Science the necessary classrooms, administrative offices, office equipment, storage space, and other required facilities in a fair and equitable manner in comparison with other departments of the institution.

d. To grant appropriate academic credit applicable toward graduation for successful completion of courses offered by the Department of Military Science.

e. To arrange for the scheduling of military classes to make it equally convenient for students to participate in Army Reserve Officers' Training Corps as in other courses at the same educational level, and to include a representative of the Department of Military Science designated by the Professor of Military Science on all faculty committees whose recommendations would directly affect the Department of Military Science.

f. To appoint an officer of the institution as military property custodian who will be empowered to requisition, receive, stock and account for Goverment property issued to the institution and otherwise to transact matters pertaining thereto, for and in behalf of the institution, or to comply with provisions of the supplement to this agreement (DA Form 918a), if application is made for and the Army accepts responsibility for all Government property provided for military instruction at this institution.

g. To conform to the regulations of the Secretary of the Army relating to issue, care, use, safekeeping, turn-in and accounting for such Government property as may be issued to the institution.

h. To comply with the provisions of law and regulations of the Secretary of the Army pertaining to the furnishing of a bond to cover the value of all Government property issued to the institution, except uniforms, expended articles, and supplies expended in operations, maintenance and instruction.

i. To produce a minimum of twenty-five officers each year.

j. To maintain an enrollment of one hundred in the basic course, when the basic course is maintained.

3. It is mutually understood and agreed as follows:

a. That this agreement shall become effective when the authorities of this institution have been notified officially that the Secretary of the Army has approved the establishment of an Army Reserve Officers' Training Corps unit on the date specified.

b. That this agreement may be terminated upon giving one academic year's notice of such intent by either party hereto.

c. That no Army officer shall be assigned to the Department of Military Science without prior approval of the authorities of this institution, and no Army officer will be continued on duty after the authorities have requested his relief for cause.

d. That the Secretary of the Army shall have the right at any time to relieve from duty any officer, warrant officer, or enlisted man of the Army assigned to the institution.

4. The authorities of this institution understand that the law requires that no unit may be established or maintained at an institution unless the senior commissioned officer assigned to the institution is given the rank of professor.

5. This agreement supersedes all existing agreements between the Department of the Army and the institution pertaining to this matter.

FOR THE INSTITUTION

Typed Name and Title REGENTS OF THE UNIV. OF MINNESOTA. L. R. Lunden, Vice President.

SIGNATURE /s/ L. R. Lunden.

DATE February 22, 1965.

FOR THE SECRETARY OF THE ARMY
Typed Name and Title J. DOUGLAS POTTER,
LT. COL. AGC ADJUTANT GENERAL.

SIGNATURE /s/ J. Douglas, Potter.

DATE 29 March 1965

A Form (Illegible) 918 Replaces Edition of Aug. 44, Which Is Obsolete.

The Following Agreement and Information is to be Considered as Part of this Contract:

AGREEMENT REGARDING (Illegible) TO BE PROVIDED FOR THE USE OF THE RESERVE OFFICERS' TRAINING CORPS PROGRAM WITHOUT EXPENSE TO THE DEPARTMENT OF THE ARMY

(Illegible)

1. OFFICES

No. of Rooms, Size, Building in Which Located, Exclusive or Joint Use

7	15′ X 20′	Armory	Exclusive use
2	20′ X 30′	Armory	Exclusive use
1	16′ X 15′	Armory	Exclusive use, staff lounge

[1]Specify whether for exclusive use of Army Department or joint use with Air or Naval Science or other Departments.

NOTE: Minimum of eight (8), seven (7) of which contain a minimum floor area of two hundred square feet each: one of which contains a minimum floor area of three hundred square feet.

2. STORAGE ROOMS

a. FOR STORAGE OF CLOTHING, SUPPLIES, SMALL ARTICLES OF EQUIPMENT, ETC.

No. of Rooms, Size, Building in Which Located, Exclusive or Joint Use

1	20′ X 9′	Armory	Exclusive use,
1	70′ X 60′	Armory	Exclusive use,
2	50′ X 30′	Armory	Exclusive use,
3	60′ X 20′	Armory	Exclusive use, student activities

b. For Storage or Large Items of Equipment, Training Aids, Motor Vehicles, etc. *(Describe)*

Gun Shed masonry bldg, cement floor, 100′ x 50′. Used for vehicles, equipment storage and personnel training site by all service ROTC units.

NOTE: Storge rooms, particularly for clothing and small articles of equipment, must be adequately lighted and ventilated and be provided with shelving, cabinets and locked arms racks. Windows must be securely barred and doors reinforced and fitted with cylinder locks. For small storage a minimum area of one thousand (1000) square feet, and possessing two entrances is required; minimum requirements for large storage is four thousand (4000) square feet.

3a. CLASSROOMS

Room and Building, Seating Capacity, Exclusive or Joint Use.

Rms 116, 103	125	116 Joint, 103 Exclu-	
Rms 105, 305, 116a	120	Joint	sive

NOTE: Classroom must be adequately lighted and ventilated and provided with standard equipment. If joint use is specified, room must be available for Army ROTC classes when scheduled. Minimum requirement—five classrooms, three of which have a normal capacity of thirty-five students and two which have a normal capacity of fifty students.

b. ASSEMBLY HALL

Seating Capacity—300. [X] is [ ] Is not provided with projection equipment for [ ] 35 mm. [X] 16 mm. film. Will Be Available for Army ROTC Classes as Follows: Upon request to University.

NOTE: Assembly hall should be adequate size for assembly of entire unit. (Normal size unit—300)

4a. Size of gym or other indoor drill area: 100′ X 70′.

b. Will be available for Army ROTC classes as follows: Joint use with other service ROTC units.

NOTE: Minimum requirement of 7,000 square feet.

5a. Size of outdoor drill area: 200 yds. X 250 yds. b. Location with respect to offices and storerooms: Adjacent. c. Will be available for Army ROTC classes as follows: Joint use.

NOTE: Minimum requirement of 20,000 square yards.

6. INDOOR TARGET RANGE

a. No. of firing points: 20. b. Will be under jurisdiction of: Army ROTC Detachment.

NOTE: Minimum requirements of five (5) firing points.

7. Specify health service or dispensary facilities and personnel which will be available annually for military type physical examination of Army ROTC students. Approved student field trips cared for under University Student Health Plan. No facilities available for physical examinations.

8. Additional facilities such as janitorial service, clerical service and any others, as specified below: Janitorial services provided for Armory, Gun Shed, and Range. Two (2) Clerk-Typists, two (2) military property storekeepers (Joint Army/AF). Use of Field House for inclement weather training area.

9. Plan of campus, showing relative location of facilities to be provided for the Army ROTC Program (Attach additional sheet).

An Original and Five (5) Copies of the Application and Agreement for Establishment of Army ROTC Unit Will Be Made: One (1) Copy Will Be Kept By The Institution and The Original and Four (4) Will Be Forwarded as follows:

1. To The Commanding General, First U.S. Army, Governors Island, New York, N. Y. 10004, from those located in: CONN., MASS., N.J., R.I., MAINE, N.H., N.Y., VT.

2. To The Commanding General, Second U.S. Army, Fort George G. Meade, Maryland 20755, from those located in: DEL., KY., OHIO, VA., D. C., MD., PA., W. VA.

3. To The Commanding General, Third U.S. Army, Fort McPherson, Ga. 30330, from those located in: ALA., GA., N.C., TENN., FLA., MISS., S.C.

4. To The Commanding General, Fourth U.S. Army, Fort Sam Houston, Texas 78234, from those located in: ARK., LA., N.M., OKLA., TEXAS.

5. To The Commanding General, Fifth U.S. Army, 1660 East Hyde Park Blvd., Chicago, Illinois 60615, from those located in: COLO., IOWA, MINN., N. DAK., WYO., ILL., KANS., MO., S. DAK., IND., MICH., NEBR., WIS.

6. To The Commanding General, Sixth U.S. Army, Presidio of San Francisco, California 94129, from those located in: ARIZ., IDAHO, NEV., UTAH, CALIF., MONT., OREG., WASH.

DATA PERTAINING TO INSTITUTION

1. Institution: University of Minnesota. Complete Mailing Address: Minneapolis, Minnesota.

2. If Army ROTC Training Is To Be Conducted at Any Auxiliary or Sub-Campus or at any Location Other Than That stated Above, Explain Fully: Army ROTC training at Minneapolis-St. Paul Campus Only.

3. Type of Institution (Check Appropriate Box): [ ] State College (Land Grant); [ ] State (Other); [ ] Municipal; [X] State University (Land-Grant); [ ] State University (Non-Land-Grant); [ ] Other Public; [ ] Denominational (Specify) .....[ ] Other (Specify).....

3. LIST AGENCIES WHICH ACCREDIT THE VARIOUS COURSES GIVEN BY INSTITUTION

a. Regional: North Central Association of Colleges and Secondary Schools.

b. Professional: Professional associations if listed by National Commission on Accrediting.

c. Other.

4a. Official Designation of Governing Body: Board or Regents.

b. No. of Members: 12.

c. Official Designation of Head of Institution: President.

6. Annual Rate (based on 2 semesters or 3 quarters) of Tuition and General Fees for Both Resident and Non-Resident Students: Residents, Most Colleges—$315—$333; Non-Residents, Most Colleges—$720—$735.

7. This Institution [ ] Has [X] Does Not Have a Cooperative "Binary" Arrangement Whereby at the End of the Junior Year Students Transfer to Another Institution at Which, After an Additional Two Years' Work They Receive a Degree. Indicate Names of Institutions With Which This Arrangement Exist:

8. This Institution Operates on a [X] Normal [ ] Accelerated Schedule. The Academic Year Consisted of [ ]a Semesters [X] 3 Quarters [ ] Other (Specify) — ..... There [X] Is [ ]Is Not a Summer Session. The Total Duration of the Academic Year, Exclusive of Vacation Periods and Examinations, Is 31 weeks.

9. THIS INSTITUTION CONFERS EARNED DEGREES AS FOLLOWS:
(Place an "X" in proper column)

	Bachelor's	Masters	Doctors
Arts and Sciences	X	X	X
Engineering	X	X	X
Business Administration	X	X	X
Education	X	X	X
Agriculture	X	X	X

Medical School	X	X	X
Dentistry	X	X	X

10. Specify The Type or Types of Screening or College Aptitude Tests Administered to All Entering Freshmen: The Tests of the American College Testing Program (ACT).

11. Extent to Which All Entering Male Freshmen Are Physically Examined: Entrance Physical Examination Form To Be Completed by a Physician When Student is Accepted for Admission and Mailed to the University Health Service Within 1 Wk., if Possible.

12. This Institution Participated in the Following: [X] Army [ ] Army Air Forces [X] Navy [X] Other (Specify) ..... Training Programs During World War II: ASTP, V-12, Air Corps Cadets.

13. Indicate the Status To Be Accorded The Army ROTC Unit Within the Institutional Organization (school, Department, etc.): Department of Air Science, Department of Military Science, Department of Naval Science.

14. Is It Contemplated That A Stand Will Be Available for ROTC Ceremonies [X] Yes [ ] No (State whether institutional or ROTC). ROTC.

15. MALE ENROLLMENT (Include only full-time, regular undergraduate, day students.)

Total Male Enrollment: 18,676. Freshman Enrollment: 6,898. Sophomore Enrollment: 3,572. Junior Enrollment: 2,755. Senior Enrollment: 3,151.

16. Remarks.

AMENDMENT TO APPLICATION AND AGREEMENT FOR ESTABLISHMENT OF ARMY RESERVE OFFICERS' TRAINING CORPS UNIT

(AR 145-330)

SUBJECT: Amendment to Agreement for Establishment of Army Reserve Officers' Training Corps Unit

THRU: (1) Commanding General, Fifth United States Army, Chicago, Ill.
(2) Commanding General, U. S. Continental Army Command, Fort Monroe, Virginia

TO: The Adjutant General, Department of the Army, Washington 25, D.C.

1. In consideration of the establishment and maintenance of the Reserve Officers' Training Corps unit at (Name of Institution) University of Minnesota, Minneapolis, Minn. pursuant to the application and agreement (DA Form #18) accepted and approved by (Name of Institution) University of Minnesota, Minneapolis, Minn. on 23 Feb. 1965, and by the Secretary of the Army on 29 Mar. 1965, it is hereby agreed between the parties to the within agreement that paragraph 3 of the mentioned application and agreement (DA Form 918) is amended as follows:

e. (Added) That no Reserve Officers' Training Corps unit of any type will be established or maintained at an educational institution which discriminates with respect to admission or subsequent treatment of students on the basis of race, color or national origin. Any institution so discriminating which now has a Reserve Officers' Training Corps unit shall be notified that commencing with the next school year no new inputs will be made and the unit will be disestablished as the remaining classes complete the program.

(1) By executing this amendment the officials affirm that this institution is operated under nondiscriminatory principles concerning enrollment and subsequent treatment of students on the basis of race, color or national origin.

(2) This amendment is given for the purpose of maintaining the Army Reserve Officers' Training Corps unit operated at this institution, which involves the expenditure of Federal funds.

2. It is further agreed that upon accomplishment, this amendment of paragraph 3 becomes a part of the original agreement.

FOR THE INSTITUTION

Typed Name and Title: William G. Shepherd, Vice President, Academic Admin.; Signature: /s/ William G. Shepherd; Date: May 19, 1965; Name of Institution: University of Minnesota; Location: Minneapolis, Minnesota 55455.

FOR THE SECRETARY OF THE ARMY

Typed Name and Title: J. Douglas Potter, Lt. Col. ARC Adjutant General; Signature: /s/ J. Douglas Potter; Date: 3 June 1965.

EQUAL OPPORTUNITY STATEMENT

LONG FORM (for use in college bulletins, employee handbooks, application forms)

The University of Minnesota is committed to the policy that all persons shall have equal access to its programs, facilities, and employment without regard to race, religion, color, sex, national origin, handicap, age or veteran status. In adhering to this policy, the University abides by the requirement of Title IX of the Education Amendments of 1972, by Sections 503 and 504 of the Rehabilitation Act of 1973, by Executive Order 11246, as amended: 38 U.S.C. 2012, the Vietnam Era Veterans Readjustment Assistance Act of 1972, as amended; and by other applicable statutes and regulations relating to equality of opportunity.

Inquiries regarding compliance may be directed to Lillian H. Williams, Director, Office of Equal Opportunity and Affirmative Action, 419 Morrill Hall, 100 Church Street S.E., University of Minnesota, Minneapolis, Minnesota 55455, (612) 373-7969, or to the Director of the Office of Civil Rights, Department of Education, Washington, D. C. 20202, or the Director of the Office of Federal Contract Compliance Programs, Department of Labor, Washington, D.C. 20210.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civil No. 3-84-957

Flowrean Orange,

Plaintiff,

vs.

University of Minnesota; the Regents of the University of Minnesota; the United States Department of the Army; Secretary of the Army; Army Reserve Officer Training Corps; and Master Sergeant Dicky Coons and Colonel Phil K. Bomersheim; individually and in their official capacity as officers of the United States Army and Army Reserve Officer Traning Corps and agents acting on behalf of the University of Minnesota,

Defendants.

MEMORANDUM AND ORDER

Veronica Casey for plaintiff.

Roger S. Haydock and Judith Bevis Langevin for defendants University of Minnesota and Regents of the University of Minnesota.

Robert M. Small and Wayne Price for defendants United States Department of the Army, Secretary of the Army, Army Reserve Officer Training Corps, Master Sergeant Dicky Coons in his official capacity, and Colonel Phil K. Bomersheim individually and in his official capacity.

Before the Court are motions to dismiss the named defendants except Sergeant Dicky Coons in his individual capacity. During the hearing on the motions, the Court granted summary judgment in favor of all defendants except Colonel Phil K. Bomersheim ("Bomersheim") in his individual capacity and Master Sergeant Dicky Coons ("Coons") in his individual capacity. The Court took under advisement the motion to dismiss defendant Bomer-

sheim in his individual capacity. The parties submitted affidavits and exhibits supporting their positions on the motions to dismiss. The court, having relied upon these materials, treats the motions as requesting summary judgment.

PLAINTIFF'S CLAIMS

Plaintiff Flowrean Orange ("Orange") was enrolled as a Reserve Officer Training Corps ("ROTC") cadet at the University of Minnesota in March 1983. Orange is a black female who alleges she was sexually harassed and racially discriminated against by her instructor defendant Master Sergeant Coons. Plaintiff cites numerous examples of sexual comments, threats, and unsolicited touching by Coons. The alleged harassment occurred between April 1983 and January 1984. She also claims that Bomersheim made racially derogatory remarks to her about her academic performance.

In January 1984, plaintiff reported these incidents to Bomersheim, a professor of military science. In February 1984, plaintiff asked Bomersheim for medical leave because she was so distressed by reason of the harassment that she could not continue her daily activities. In June 1984, Bomersheim disenrolled plaintiff from the ROTC program. Orange contends that Bomersheim disenrolled her in retaliation for reporting Coons.

Plaintiff alleges defendants violated 42 U.S.C. §§ 1981 and 1983. She also alleges violations of Minnesota Statutes §§ 363.01 and .03 governing race and sex discrimination, and the torts of intentional infliction of emotional distress and outrage. She requests monetary and injunc-

tive relief. As injunctive relief, plaintiff requests (1) a declaration that the practices, policies, and customs of the United States Army ("Army"), ROTC, and University of Minnesota ("University") constitute sex and race discrimination violating 42 U.S.C. §§ 1981 and 1983 and Minnesota Statutes §§ 363.01 and .03; and (2) an injunction prohibiting the Army, ROTC, and University from committing illegal discriminatory practices.

The standards for summary judgment are well settled.

> In passing upon a motion for summary judgment the Court is required to view the facts in the light most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts disclosed in the pleadings, depositions, and affidavits filed in the case.

Equal Employment Opportunity Commission v. Liberty Loan Corp., 584 F.2d 853, 857 (8th Cir. 1978) (citations omitted). Therefore the Court will assume that the facts as alleged by plaintiff are true.

MONETARY CLAIMS AGAINST THE UNIVERSITY, REGENTS OF THE UNIVERSITY, AND BOMERSHEIM AND COONS AS AGENTS OF THE UNIVERSITY

The Eleventh Amendment prohibits citizens from suing any state in federal court except upon consent of the State. *Hans v. Louisiana*, 134 U.S. 1 (1890). The Court has previously determined that the University is an instrumentality of the State of Minnesota for purposes of the Eleventh Amendment. *Stanley v. Magrath*, Civ. No. 3-80-452 Memorandum and Order, p. 11 (D. Minn. March 25, 1981) (Renner, J.); *see also Walstad v. University of Minnesota Hospitals*, 442 F.2d 634, 642 (8th Cir. 1971).

The Board of Regents, as the governing body of the University, is also an instrumentality of the State entiled to immunity under the Eleventh Amendment. *See Walstead,* 442 F.2d at 641-42; *Stanley,* Civ. No. 3-80-452 at 11. Since neither the State nor the University has consented to suit in federal court under the federal civil rights statutes, the Eleventh Amendment immunity applies to these defendants. *Stanley.* Civ. No. 3-80-452 at 11.

The scope of the Eleventh Amendment immunity is well settled. The Constitution permits only prospective injunctive relief against state officials in their official capacities. Monetary relief against the State, its officials, or its agencies is prohibited. *Edelman v. Jordan,* 415 U.S. 651 (1974). Therefore, plaintiff's claims for damages against the University, Regents, and Bomersheim and Coons as agents of the University must be dismissed.[1]

In *Pennhurst State School & Hospital v. Haldeman,* 104 S. Ct. 900 (1984), the Court held the Eleventh Amendment immunity prohibited claims in federal court that state officials violated state law while acting in their official capacities. The immunity applies to state law claims within the court's pendent jurisdiction. *Id.* at 919. These claims will also be dismissed.

MONETARY CLAIMS AGAINST THE ARMY, SECRETARY OF THE ARMY, ROTC, COONS IN HIS OFFICIAL CAPACITY, AND BOMERSHEIM IN HIS OFFICIAL CAPACITY.

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[1]Bomersheim and Coons as agents of the University cannot be held in once their principal, the University, is dismissed.

Generally, the United States, as sovereign, is immune from suit except as it consents to be sued. *United States v. Mitchell,* 445 U.S. 535, 538 (1980). Actions against federal officials are treated as actions against the sovereign if the relief sought would operate against the sovereign. *Hawaii v. Gordon,* 373 U.S. 57, 58 (1963).

> The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."

Dugan v. Rank, 372 U.S. 609, 620 (1963) (citations omitted). To the extent plaintiff seeks damages from the Army, Secretary of the Army, ROTC, and Bomersheim and Coons in their official capacities, plaintiff's requested relief would operate against the sovereign.

Sovereign immunity is particularly broad where the military is involved. Because the military's unique disciplinary structure must be free of civilian interference, the government and its agencies are immune from suit in tort for injuries to service members incident to their service. *Feres v. United States,* 340 U.S. 135, 146 (1950). The *Feres* doctrine extends to constitutional violations such as the §§ 1981 and 1983 claims made here. *Chappell v. Wallace,* 103 S. Ct. 2362 (1983). The *Feres* doctrine also immunizes the Army, Secretary of the Army, ROTC, and Coons and Bomersheim in the official capacities for injuries to plaintiff that were incident to her military service.

Plaintiff's injuries were incident to her service as a ROTC cadet. The alleged injuries were inflicted upon

plaintiff by her commanding officers while she was acting as a cadet. The ROTC, as a training ground for reserve officers, is an arm of the military. Consequently, the Army, Secretary of the Army, ROTC, and Coons and Bomersheim in their official capacities are entitled to summary judgment on plaintiff's monetary claims.

BOMERSHEIM IN HIS INDIVIDUAL CAPACITY

The Eighth Circuit has extended the *Feres* doctrine to immunize military defendants in their individual capacities. *Brown v. United States*, 739 F.2d 362, 369 (8th Cir. 1984); *see also Hass v. United States*, 518 F.2d 1138, 1143 (4th Cir. 1975); *Bailey v. DeQuevedo*, 375 F.2d 72, 73-74 (3d Cir. 1967). In *Brown*, the court noted that "the preservation of military discipline is at the heart of the *Feres* doctrine. Courts have repeatedly recognized the importance of '[t]he peculiar and special relationship of the soldier to his superiors.'" *Brown v. United States*, 739 F.2d at 368. In *Chappell v. Wallace*, 102 S.Ct. 2362, 2365 (1983), the Supreme Court cautioned:

> Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

Id.

To permit an action by plaintiff against Bomersheim would infringe upon the command relationship between a service member and her superior. Furthermore, it would involve inquiry into military decisionmaking with respect to disciplinary matters. *See Brown v. United States*, 739 F.2d at 369. Bomersheim's disenrollment of plaintiff was

a disciplinary action taken by a superior officer against someone under his command. Such action involves the core relationship the *Feres* doctrine is meant to protect.

CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff's claim for declaratory relief is nothing but a request for a conclusion of law and for an injunction prohibiting conduct already prohibited by law.[2] Plaintiff shows no threat of irreparable harm warranting such equitable action.

Based upon the foregoing and the entire file, IT IS ORDERED that summary judgment is granted in favor of defendants University of Minnesota, Regents of the University of Minnesota, the United States Department of the Army, the Army Reserve Officer Training Corps, Master Sergeant Dicky Coons in his official capacity as an officer of the United States Army and as an agent of the University of Minnesota, and Colonel Phil K. Bomersheim individually, in his capacity as an officer of the United States Army, and as an agent of the University of Minnesota.

Dated: January 9, 1985.

/s/ Robert G. Renner
United States District Judge

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[2]To issue an injunction of such a broad scope and with such general terms as plaintiff requests would violate the letter and spirit of Federal Rule of Civil Procedure 65(d).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

THIRD DIVISION
CIVIL NO. 3-84-957

FLOWREAN ORANGE

Plaintiff,

vs.

MASTER SARGEANT DICKY COONS

Defendant.

ORDER OF DISMISSAL

Having given this plaintiff adequate time to locate new counsel to proceed with her case and plaintiff having failed to do so,

IT IS ORDERED that this case be dismissed.

Dated: December 18, 1985

/s/ Robert G. Renner, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MEMORANDUM AND ORDER

Civil No. 3-84-957

Filed January 8, 1986
Francis Dosal, Clerk

Flowrean Orange,

Plaintiff,

vs.

University of Minnesota; the Regents of the University of Minnesota; the United States Department of the Army; Secretary of the Army; Army Reserve Officer Training Corps; and Master Sergeant Dicky Coons and Colonel Phil K. Bomersheim; individually and in their official capacity and officer of the United States Army and Army Reserve Officer Training Corps and agents acting on behalf of the University of Minnesota,

Defendants.

Before the court is plaintiff's motion to reconsider this court's summary judgment decision. Since the court has entered judgment on plaintiff's claims, the court considers this a motion for relief from judgment under Fed. R. Civ. P. 60(b). The matter was considered without oral argument. Plaintiff is pro se.

Plaintiff has submitted several "exhibits" with her motion. They relate to the allegations of sexual harassment and racial discrimination against defendants. It seems the documents have been submitted to support a motion to reconsider the January 9, 1985 Memorandum and

Order dismissing all defendants except Master Sergeant Dicky Coons from the action. This court will not reconsider this decision in light of plaintiff's newly submitted evidence. These exhibits do not qualify as "newly discovered evidence" under Rule 60(b). The court accepted plaintiff's allegations of sexual harassment and racial discrimination as true when ruling on the summary judgment motion. The evidence plaintiff has submitted merely supports what the court has already accepted as fact. The summary judgment was entered because the law does not permit plaintiff to pursue these defendants in this court.

Plaintiff has failed to obtain a default judgment against Master Sergeant Dicky Coons. This action has been pending for one and one-half years. The default motion was set on for hearing but was not pursued. Plaintiff does not complain that the case was dismissed for her failure to obtain a default judgment; in fact, she has wanted to appeal the summary judgment order.[1] However, the dismissal of the plaintiff's action as against Master Sergeant Dicky Coons should be clarified to state that it is without prejudice.

Based upon the foregoing and the entire file, IT IS ORDERED that plaintiff's motion to reconsider the Summary Judgment Order dated January 9, 1985 is denied.

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[1]The Clerk of Court's file in this matter contains a Notice To Pro Se Litigants for Flowrean Orange which states that her 60 day appeal period expired March 9, 1985. Since judgment was not entered on any part of this action until December 18, 1985, the notice is in error. Plaintiff still has time to appeal the judgment.

IT IS FURTHER ORDERED that the Clerk of Court amend the judgment applying to Master Sergeant Dicky Coons to state that it is without prejudice.

Dated: January 8, 1986.

/s/ Robert G. Renner
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH DISTRICT

No. 86-5032

Appeal from the United States District Court
for the District of Minnesota.

Flowrean Orange,

Appellant,

v.

University of Minnesota, et al.,

Appellees.

Filed: January 29, 1986

ORDER

Appellant's motion for appointment of counsel has been considered by the court and is denied.

The court has examined the file of the United States District Court for the District of Minnesota in this case. It is ordered that appellant show cause within fifteen (15) days from the date of this order why this appeal should not be dismissed as without arguable merit and as frivolous.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5032

Appeal from the United States District Court
for the District of Minnesota.

Flowrean Orange,

Appellant,

v.

University of Minnesota; the Regents of the University of Minnesota; the United States Department of the Army; Secretary of the Army; Army Reserve Officer Training Corps; and Master Sergeant Dicky Coons and Colonel Phil K. Bomersheim, individually and in their official capacity as officers of the United States Army and Army Reserve Officer Training Corps and agents acting on behalf of the University of Minnesota,

Appellees.

Submitted: February 28, 1986

Filed: April 17, 1986

Before ROSS, McMILLIAN and JOHN R. GIBSON,
Circuit Judges.

PER CURIAM.

Flowrean Orange appeals orders of the district court[1] that either granted summary judgment to or dismissed all defendants. She brought this claim under 42 U.S.C. §§ 1983 and 1981 (1982) alleging sexual harassment and sexual and racial discrimination. On January 5, 1985, the district court entered an order granting summary judgment to all defendants except Master Sergeant Dicky Coons. On December 18, 1985, the district court dismissed the action against Coons for failure to proceed with the case and on January 3, 1986, denied a motion for reconsideration, but clarified its order to make plain that Orange had failed to obtain a default judgment against Coons and that the action against Coons was dismissed without prejudice. From these orders Orange appeals. We entered an order denying appointment of counsel and requiring that she show cause why the appeal should not be dismissed as without arguable merit and frivolous. Having studied her response, we now affirm the judgment of the district court.

The complaint alleges that Orange was enrolled in the Army Reserve Officer Training Corps at the University of Minnesota in March 1983. She alleges that she is a black female and was sexually harassed and sexually and racially discriminated against by her instructor, Master Sergeant Coons. She alleges that Colonel Phil Bomersheim, as well as the Secretary of the Army, the United States Department of the Army, the University of Minnesota and the Regents of the University of Minnesota, were also responsible for the actions of Sergeant Coons.

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[1]The Honorable Robert G. Renner, United States District Judge for the District of Minnesota.

The materials that have been filed with us in response to our order contain a great deal of the material furnished to the district court, as well as appellant's factual recitation, which also to a large degree was before the district court. These materials make clear that Orange made complaints against Master Sergeant Coons and that Colonel Bomersheim investigated the allegations and, as commander, found sufficient grounds to conclude that Master Sergeant Coons did sexually harass her on at least one occasion. He was suspended from duty and was relieved for cause and reassigned.

Judge Renner entered judgment in favor of the University of Minnesota and its Board of Regents on the basis of immunity under the eleventh amendment and Colonel Bomersheim and Master Sergeant Coons, as agents of the University, were held to be covered by such immunity. In addition, the claims against the Army, the Secretary of the Army, the Army Reserve Officers Training Corps and Colonel Bomersheim and Master Sergeant Coons in their official capacity were dismissed. *Feres v. United States,* 340 U.S. 135, 146 (1950). Judge Renner ruled that the *Feres* doctrine extended to constitutional violations brought under sections 1981 and 1983. The district court further found that Colonel Bomersheim in his individual capacity was immunized by *Feres.* The district court granted summary judgment against all defendants except Master Sergeant Coons in his individual capacity.

After the entry of this order on January 9, 1986, counsel for plaintiff withdrew and was replaced by additional counsel, and the record reflects an affidavit of unsuccessful efforts to serve Coons with a notice of default hearing and of orders authorizing publication of the notice. The

dismissal as to Coons followed on December 18, 1985, specifying that plaintiff had had adequate time to locate new counsel to proceed with her case and had failed to do so.

We have carefully considered the order of the district court, as well as the materials before it, and the materials filed with this court, giving special attention to those filed in response to our show cause order. We conclude that there is no error of law in the order of the district court entering summary judgment as to all defendants except Master Sergeant Dicky Coons in his individual capacity. There was no abuse of discretion in the dismissal without prejudice as to Coons. The judgment should be affirmed as the questions presented do not require further consideration. *See* 8th Cir. R. 12(a).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

[Do not publish]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5032-MN

Flowrean Orange,

Appellant,

vs.

University of Minnesota, et al.,

Appellees.

Appeal from the United States District Court
for the District of Minnesota

Appellant's "Motion for Rehearing and en banc and a Jury Trial Demanded" has been considered by the Court and is denied.

May 30, 1986

APPENDIX A:11
PUBLIC HEALTH AND WELFARE--CIVIL ACTION FOR DEPRIVATION OF RIGHTS

(42 USCS § 1983)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.